APPEAL NO. 200100-s
FILED MARCH 12, 2020

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on December 12, 2019, in (city), Texas, with (administrative law judge) presiding as the administrative law judge (ALJ). The ALJ resolved the disputed issues by deciding that: (1) the respondent (claimant) sustained a compensable injury, in the form of an occupational disease, with a date of injury of (date of injury); (2) the claimant had disability from March 14 through March 29, 2019, and from May 25 through June 18, 2019; and (3) the claimant did not have disability on March 12, March 13, from March 30 through May 24, 2019, nor from June 19, 2019, through the date of the CCH.

The appellant (self-insured) appealed the ALJ's determination of compensability as well as the determination of disability in favor of the claimant. The self-insured contends that the ALJ improperly determined that the claimant met the gateway requirements of Government Code Section 607.052(a)(1), (2), and (3). The self-insured also contends that the ALJ incorrectly determined that the claimant met the requirements of Government Code Section 607.052(b)(4) because the claimant admitted to smoking cigarettes at some point in his past. The claimant responded, urging affirmance of the appealed determinations. The ALJ's determination that the claimant did not have disability on March 12, March 13, from March 30 through May 24, 2019, nor from June 19, 2019, through the date of the CCH was not appealed and has become final pursuant to Section 410.169.

DECISION

Reversed and remanded.

We note that the Evidence Presented section of the decision states Claimant's Exhibits 1 through 19 were admitted. However, the record reflects that Claimant's Exhibits 1 through 20 were admitted at the CCH.

The evidence reflects that the claimant had been employed with the self-insured since February 2009. The claimant first worked as a firefighter and emergency medical technician. The claimant testified he was promoted to an engineer operator, which required him to drive the firefighting apparatus to the scene, help pump water into the fire, and occasionally suit up and fight interior structure fires. It is undisputed the claimant was diagnosed with bladder cancer in March 2019. The claimant contends he developed bladder cancer as a result of exposure to heat, smoke, and carcinogens during his work for the self-insured.

Government Code Section 607.052. APPLICABILITY.

(a) Notwithstanding any other law, this subchapter applies only to a firefighter or emergency medical technician who:

(1) on becoming employed or during employment as a firefighter or emergency medical technician, received a physical examination that failed to reveal evidence of the illness or disease for which benefits or compensation are sought using a presumption established by this subchapter;

(2) is employed for five or more years as a firefighter or emergency medical technician; and

(3) seeks benefits or compensation for a disease or illness covered by this subchapter that is discovered during employment as a firefighter or emergency medical technician.

Based upon the evidence presented, the ALJ found the claimant met the gateway requirements of Government Code Section 607.052(a)(1), (2), and (3). The ALJ specifically found that upon becoming a firefighter the claimant had a physical examination that failed to reveal evidence of bladder cancer; the claimant was employed for more than five years[1] as a firefighter or emergency medical technician; and the claimant was seeking benefits for bladder cancer discovered during his employment as a firefighter or emergency medical technician. The evidence supports the ALJ's finding that the claimant met the gateway requirements of Government Code Section 607.052(a)(1), (2), and (3).

The question now turns to whether the cancer presumption would apply under Government Code Section 607.052(b)(4).

Government Code Section 607.052 provides in pertinent part the following:

(b) A presumption under this subchapter does not apply:

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(4) if the disease or illness for which benefits or compensation is sought is known to be caused by the use of tobacco and:

[1] We note Government Code Section 607.052(a)(2) requires employment as a firefighter or emergency medical technician for five or more years.

(A) the firefighter or emergency medical technician is or has been a user of tobacco

The evidence reflects that smoking cigarettes is known to cause bladder cancer. The claimant testified at the CCH that after he graduated high school in 2004, he had socially smoked cigarettes from approximately 2005 to 2006. The claimant testified he had smoked cigarettes on maybe six or seven occasions, he never liked them or purchased any, never considered himself a smoker, and that he had perhaps half a dozen cigarettes in his life at that time and "never picked another one up." The ALJ stated the following in her discussion regarding the claimant's tobacco use:

> . . . [the] [c]laimant's testimony regarding his prior limited use of tobacco was persuasive. Consequently, [the] [c]laimant is not excluded from establishing the presumption under Section 607.052(b)(4) of the Texas Government Code.

The self-insured states on appeal that a plain reading of Government Code Section 607.052(b)(4) indicates that if the disease or illness for which benefits or compensation is sought is known to be caused by the use of tobacco and the firefighter or emergency medical technician is or has been a user of tobacco, the presumption does not apply. The self-insured contends that the statute "does not mention or discuss how long the injured worker must use tobacco or the gap between the use of tobacco and the diagnosis." The self-insured argues the cancer presumption does not apply in this case because the evidence established smoking cigarettes is known to cause bladder cancer and the claimant has smoked cigarettes.

The claimant contends in his response to the self-insured's appeal that neither the Texas Government Code nor the Texas Labor Code define the term "user" or "tobacco user." The claimant argues that the definition of tobacco use found in the Code of Federal Regulations and used by health insurance companies should be used. 45 C.F.R. § 147.102(a)(1)(iv) defines tobacco use as:

> . . . use of tobacco on average four or more times per week within no longer than the past [six] months. This includes all tobacco products, except that tobacco use does not include religious or ceremonial use of tobacco. Further, tobacco use must be defined in terms of when a tobacco product was last used.

The claimant also argues that tobacco use is "any habitual use of the tobacco plant leaf and its products," and a user is "based on long-continued use." The claimant contends that smoking a total of approximately seven cigarettes in his life approximately 15 years before his bladder cancer diagnosis does not make him a habitual user of

tobacco and does not exclude the cancer presumption under Government Code Section 607.052(b)(4).

Based on the plain reading of Government Code Section 607.052(b)(4), the cancer presumption under 607.052 does not apply if the disease or illness is known to be caused by the use of tobacco, and the firefighter or emergency medical technician is or has been a user of tobacco. The statute does not define a minimal amount of tobacco used or the length of time tobacco has been used by the firefighter or emergency medical technician that would preclude the cancer presumption. We decline to impose a threshold amount or time frame when the legislature has not done so. We note the House Research Organization (HRO) Bill Analysis for S.B. 310 reflects that opponents of S.B. 310 presented the argument that a firefighter "who smoked for a short period of time in the past might be denied benefits if he developed certain forms of cancer, even though [firefighters] in burning buildings can be exposed to a variety of cancer-causing carcinogens." HRO Bill Analysis, Tex. S.B. 310, 79th Leg. R.S. (2005). The facts of this case establish that bladder cancer is known to be caused by smoking cigarettes. The facts also establish that the claimant has smoked cigarettes in the past. Therefore, we hold that under Government Code Section 607.052(b)(4), the claimant's tobacco use precludes the claimant from establishing the cancer presumption.

The ALJ based her determination that the claimant sustained a compensable injury in the form of an occupational disease with a date of injury of (date of injury), on the basis that the claimant is entitled to the presumption under Government Code Section 607.055(a). Given that we have held the claimant's tobacco use precludes the cancer presumption from applying in this case, we reverse the ALJ's determination that the claimant sustained a compensable injury in the form of an occupational disease with a date of injury of (date of injury). We remand the issue of compensability to the ALJ to make findings of fact, conclusions of law, and a determination whether the claimant sustained a compensable injury in the form of an occupational disease with a date of injury of (date of injury), for further action in accordance with this decision.

Because we have reversed and remanded the ALJ's compensability determination, we also reverse the ALJ's determination that the claimant had disability from March 14 through March 29, 2019, and from May 25 through June 18, 2019, and we remand the issue of disability for these periods to the ALJ for further action consistent with this decision.

We note the ALJ stated in a footnote of the decision that the 86th Texas Legislature amended Government Code Chapter 607 by passage of S.B. 2551, and that the amendments apply only to claims filed on or after June 10, 2019. The ALJ also stated that "[t]he claim in this case is governed by the law as it existed **on the date the**

compensable injury occurred" (emphasis added). However, S.B. 2551 states that the amendments apply only to a claim for workers' compensation benefits filed on or after the effective date of this Act, and that "a claim filed before that date is governed by the law as it existed **on the date the claim was filed**, and the former law is continued in effect for that purpose" (emphasis added). The evidence reflects that the amendments in S.B. 2551 are not applicable in the case on appeal.

REMAND INSTRUCTIONS

On remand the ALJ is to make findings of fact, conclusions of law, and a decision on whether the claimant sustained a compensable injury in the form of an occupational disease with a date of injury of (date of injury), considering the evidence and without applying the cancer presumption. The ALJ is then to make findings of fact, conclusions of law, and a decision on whether the claimant had disability from March 14 through March 29, 2019, and from May 25 through June 18, 2019.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the ALJ, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Department of Insurance, Division of Workers' Compensation, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* Appeals Panel Decision 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **CITY OF HOUSTON (a self-insured governmental entity)** and the name and address of its registered agent for service of process is

ANNA RUSSELL – CITY SECRETARY
900 BAGBY
HOUSTON, TEXAS 77002.

Carisa Space-Beam
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Margaret L. Turner
Appeals Judge